IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-642

JOHN J. DOUGHERTY,

Petitioner,

v.

CHRISTIAN HAALAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, John J. Dougherty, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered herein on July 17, 1979.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania directing a verdict in favor of defendant was orally stated from the bench, and is not reported. Those portions of the record setting forth

the reasoning of the District Court in granting a directed verdict are printed as Appendix B (A2). The order of the District Court granting the motion for directed verdict and entering judgment in favor of defendant is not reported and is printed as Appendix C (A22).

The opinion of the District Court denying plaintiff's motion for a new trial is officially reported at 457 F. Supp. 860 (E. D. Pa. 1978), and is printed as Appendix D (A23). The Order of the District Court denying plaintiff's motion for new trial is not reported and is printed as Appendix E (A42).

The Judgment Order of the United States Court of Appeals for the Third Circuit is not officially reported and is printed as Appendix F (A43).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 17, 1979 (Appendix F (A43)). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did not the Trial Court err in holding that under the 1972 amendments to Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act an injured longshoreman, as a condition of recovery against a shipowner for injuries sustained as a result of a condition aboard ship, is required to show that the vessel was negligent in relying upon the stevedore-employer's expertise in dealing with that condition and in assuming the work could safely be done by the stevedore?

2. Under the 1972 amendments to Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, is not the appropriate standard of care one which would permit a finding of negligence upon a showing that (1) the vessel knew or by the exercise of reasonable care could have discovered the condition on board the ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger?

STATUTES INVOLVED.

The statutory provision involved in Section 5(b) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. § 905(b). The full text of this statutory provision is printed as Appendix A (A1).

STATEMENT OF THE CASE.

This action was brought by the petitioner longshoreman against the respondent shipowner to recover damages for personal injuries sustained by the longshoreman when he was struck by a heavy piece of steel pipe while working aboard respondent's vessel, the S. S. Concordia Tarek. Federal jurisdiction was based on diversity of citizenship. 28 U. S. C., Sec. 1332.

At the trial of this case, petitioner contended that the vessel's officers were negligent in directing the petitioner's longshore gang to load heavy pipe in the inshore portion of the No. 3 hatch of the vessel when the vessel was already listing in an inshore direction; in countermanding the procedure adopted by the stevedore to deal with the list; and in failing to take appropriate action to straighten the vessel.

Viewing the evidence in a light most favorable to plaintiff, the Trial Court found as follows. On the day in question, plaintiff was a holdman with a longshore gang that was assigned to load sections of 15 inch diameter metal pipe, each about 50 feet long and weighing about half a ton, into the lower hold of the vessel's No. 3 hatch (A25). As plaintiff's gang boarded the vessel that morning, they observed that the vessel was listing approximately 5 to 8 degrees to the inshore side (A25).

When the No. 3 hatch was opened, the longshoremen observed that 30 foot sections of 5 inch pipe, stacked 2 tiers high, were already stowed in the offshore portion of the lower hold (A25-26). The longshoremen determined that in order to help correct the ship's list, they would stack the 30 foot sections of pipe into the wing and then load the longer and heavier sections of pipe on the offshore side of the hold, alongside and inboard the 30 foot section (A26). While the longshoremen were making preparations to carry out this procedure, a ship's mate instructed the gang's foreman that the longer pipe was to be stowed in the inshore side of the hold (A26). The hatch foreman argued with the mate, contending that it would be more logical to stow the pipe on the offshore side rather than on the inshore side since the ship was already listing to the inshore side. However, the ship's mate insisted that the pipe be stowed on the inshore side (A26). Accordingly, the hatch foreman instructed his men to so proceed (A26). While the 50 foot sections of pipe were being landed by plaintiff's gang, one section of pipe got away from the longshoremen who were attempting to steady it at each end and rolled inshore with the ship's list, striking and injuring the petitioner (A26-27).

It was undisputed that the ship's mate had authority to direct where in the vessel particular cargo was to be

stowed and, in particular, to direct that the pipe taken on at Philadelphia be stowed on the inshore, rather than the offshore side of the lower hold (A27). Moreover, the Trial Court found that evidence had been submitted which arguably could support a jury finding that an experienced stevedore could not safely carry out the mate's instruction to load the pipe in the direction of the list (A31).

At the conclusion of all the evidence, the Trial Judge granted the motion of the defendant vessel for a directed verdict. At that time, the Trial Judge concluded that the plaintiff longshoreman had the burden of proving that the condition in question created an unreasonable risk of harm "which could not be overcome by a method of operation conducted by a competent, experienced stevedore" (A21) and that "there is no evidence that this operation could not have been conducted by an experienced, competent stevedore given the seven degree list." (A21).

Thereafter, plaintiff moved for a new trial and referred the Trial Judge to portions of the record containing evidence which, in fact, did support a finding that the operation could not have been conducted safely by an experienced, competent stevedore given the list. The Trial Judge acknowledged that the evidence submitted arguably could support such a jury finding (A31). Nonetheless, the motion for new trial was denied.

In denying the motion for a new trial, the Trial Judge formulated the following standard of care:

> "In short, an injured longshoreman seeking to impose liability on the vessel under Section 905(b) must show that the vessel was negligent in relying upon the stevedore's expertise and in assuming that the work could be safely done by the stevedore. This in turn requires a showing that (1) the conditions aboard ship created an unreasonable risk of harm, even for a longshoreman

working under the guidance of an expert stevedore, and (2) the vessel, although not possessed of the stevedore's expertise, knew or should have known of this unreasonable risk of harm." (A29-30)

The Trial Judge did find that evidence had been submitted which arguably could support a jury finding that the mate's instruction gave rise to an unreasonable risk of harm to the longshoremen, "notwithstanding that they were working under the direction of an expert stevedore." (A31). However, the Trial Judge found that the evidence was insufficient to demonstrate that the defendant vessel knew or should have known "that an experienced stevedore could not safely load this cargo on the inshore side of the ship, given the ship's inshore list." (A32).

The Court of Appeals affirmed the judgment of the District Court, without opinion, by the issuance of a Judgment Order which stated:

"After considering the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

Each side to bear its own costs." (A43)

REASONS FOR GRANTING THE WRIT.

I. The Standard of Care Adopted by the District Court Under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as Affirmed by the Court of Appeals, Conflicts With the Decision of This Court in *Edmonds v. Compagnie Generale Transatlantique*, — U. S. —, 61 L. Ed. 2d 521 (1979).

Under the standard of care formulated by the District Court and affirmed, *sub silento*, by the Third Circuit, a vessel is relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship unless the longshoreman can establish that these conditions created an unreasonable risk of harm "even for a longshoreman working under the guidance of an expert stevedore" and the vessel, "although not possessed of the stevedore's expertise, knew or should have known of this unreasonable risk of harm." In short, this standard of care relieves a vessel from liability for unreasonably dangerous conditions aboard ship whenever the stevedore fails to perform its tasks in an "expert" fashion, regardless of whether the individual longshoreman is personally at fault. The effect is to impute to the longshoremen the negligence of a stevedore employer and establish that negligence as a complete bar to recovery against the vessel.

In *Edmonds v. Compagnie Generale Transatlantique*, — U. S. —, 61 L. Ed. 2d 521 (1979), this Court held that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act did not modify a longshoreman's pre-existing right to recover for his injuries in full against a negligent shipowner, even in cases where the negligence of the stevedore contributed to the injury. Thus, regardless of the conduct of the stevedore employer,

a negligent shipowner is liable for the full amount of the longshoreman's damages.

In *Edmonds,* this Court declined to impute the negligence of the stevedore to the longshoreman to reduce the longshoreman's recovery against the negligent shipowner. Yet, the rule formulated by the District Court in this case would bar recovery against a negligent shipowner if the stevedore did not carry out its duties in an "expert" fashion. If the negligence of the stevedore employer is not permitted to reduce the longshoreman's recovery against a negligent shipowner, it certainly should not be permitted to totally bar a longshoreman's recovery as resulted in the instant case.

A different panel of the United States Court of Appeals for the Third Circuit reached this conclusion in a case decided a little over a month after the entry of the Judgment Order in the case at bar. In *Griffith v. Wheeling-Pittsburgh Steel Corporation,* — F. 2d — (3rd Cir., August 24, 1979),[1] at page 12 of the Slip Opinion (A58), the Third Circuit rejected a standard of care similar to the one adopted by the District Court in this case, as follows:

> ". . . Under America's first proposed standard of care, the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his task in an 'expert and experienced' fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to

1. A copy of the Slip Opinion in the *Griffith* case is appended hereto as Appendix G (A45).

> recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in Edmonds v. Compagnie Generale Transatlantique, supra. It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule barring all recovery against the negligent shipowner on the basis of imputed employer negligence."

It is submitted that the reasoning of the *Griffith* panel should also have been followed by the panel in the case at bar. That reasoning clearly indicates that the result in this case is at odds with this Court's interpretation of the 1972 Amendments in *Edmonds.* Accordingly, certiorari should be granted and the decision below should be reversed.

II. The Decision Below Is in Conflict With the Decisions of the Ninth Circuit in *Santos v. Scindia Steam Navigation Co., Ltd.,* 598 F. 2d 480 (9th Cir. 1979) and Another Panel of the Third Circuit in *Griffith v. Wheeling-Pittsburgh Steel Corporation,* — F. 2d — (3rd Cir. 1979).

As previously noted, the Third Circuit panel in *Griffith, supra,* rejected any standard of care which would bar a longshoreman's recovery against a negligent vessel due to negligence on the part of the stevedore employer. Instead, the *Griffith* panel formulated the following standard of care at page 14 of the slip opinion:

> "The sounder approach, we think, is to recognize that Section 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a

land based business. *Accord, Santos v. Scindia Steam Navigation Co.*, supra, 598 F. 2d at 485-88; *Gallardo v. Westfal-Larsen & Co. A/S*, supra, 435 F. Supp. at 496. *See Kermarec v. Compagnie Generale Transatlantique*, supra, 358 U. S. at 632; *Brown v. Ivarans Rederi A/S*, supra, 545 F. 2d at 863. *Cf.* Restatement (Second) of Torts, §§ 281-83, 302A, 305, 452. Proceeding from this broad common law standard, Federal Courts may develop on a case by case basis, a uniform federal law of negligence, referring for guidance to the 'land based' standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.

"At a minimum we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. See *Santos v. Scindia Steam Navigation Co.*, supra, 598 F. 2d at 485."

The standard of care formulated in *Griffith* in no way tests the conduct of the vessel in light of the conduct of the stevedore employer. The vessel is liable if it knew or should have known that the dangerous condition on board its ship posed an unreasonable risk of harm to longshoremen and failed to exercise reasonable care to protect the longshoremen against that danger, even if it might have

assumed that an expert stevedore could deal with the situation. Under such a standard of care, this case would have been submitted to a jury for determination.

So, too, in *Santos v. Scindia Steam Navigation Co.*, supra, a case heavily relied upon in *Griffith*, the standard of care adopted by the Court would have resulted in this case being submitted to a jury.[2] In *Santos*, the Court adopted the following standard of negligence in actions brought under 33 U. S. C., Section 905(b) (598 F. 2d at page 485):

"A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner

(a) knows of, or by the exercise of reasonable care would discover, the condition, and should realise that it involves an unreasonable risk of harm to such longshoremen, and

(b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger."

As in *Griffith*, the adoption of the standard of care set forth above would have resulted in the instant case being submitted to the jury since analysis of the stevedore's behavior is not pertinent to that standard.

It is respectfully submitted that certiorari should be granted to resolve the clear conflict between the standard of care formulated in the instant case and the standard of care followed by the Ninth Circuit and the *Griffith* panel of the Third Circuit.

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2. Interestingly, the *Santos* decision relies in large measure upon the scholarly opinion of Judge Orrick in *Gallardo v. Westfal-Larsen & Co., A/S*, 435 F. Supp. 484 (N. D. Cal., 1977), a case squarely rejected by the District Court in its opinion denying the motion for new trial in this case (A28-29).

III. This Case Presents an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

In 1972, Congress adopted sweeping amendments to the Longshoremen's and Harbor Workers' Compensation Act which resulted in the modifications of the right of an injured longshoreman to recover in an action against a "vessel." [3] These Amendments included a revision of Section 5(b) of the Act, 33 U. S. C. § 905(b) to read as follows: [4]

> "In the event of injury to a person covered under this chapter by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter."

3. The term "vessel" is defined at 33 U. S. C. § 902(21) as follows:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew members."

4. Pub. L. 92-506, § 18(a), 86 Stat. 1263.

Clearly, the language of Section 905(b) provides no meaningful guidance to uncovering an appropriate standard of care under the statute. It merely refers to the "negligence of the vessel" without attempting to cast further light on any standard to be followed in determining vessel negligence.

In the seven years that have elapsed since the 1972 amendments to the Act, no decision has emanated from this Court which would issue guidance to the lower courts in adjudicating longshoremen's personal injury actions. As a result, the various Courts of Appeals which have considered actions arising under Section 905(b) have adopted a myriad of standards to deal with these cases. The resulting lack of uniformity flys squarely in the face of the intent of Congress to develop a uniform body of law under Section 905(b). Thus, the House Report accompanying the 1972 Amendments [5] provides at 3 U. S. Code Cong. Ad. News (1972) at page 4705:

> "Finally, the Committee does not intend that the negligence remedy authorized in the Bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the

5. H. R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 3 U. S. Code Cong. Ad. News 4698 (1972).

law shall be determined as a matter of Federal law . . ."

At the present time, however, the divergent views of the various Circuits which have considered this area of law have in fact resulted in the negligence remedy authorized by Section 905(b) being "applied differently in different ports" depending on the law of the Circuit in which the port is located.

A brief survey of the standards presently applied by the various circuits demonstrates the following:

1. The Second, Fourth and Fifth Circuits have defined "negligence" under Section 905(b) in terms of a landowner's duty to invitees under Sections 343 and 343A of the Restatement of Torts, 2d. See *e.g., Canizzo v. Farrell Lines, Inc.*, 579 F. 2d 682, 684-5 (2nd Cir., 1978); *Samuels v. Empresa-Lineas Maritimas Argentinas,* 573 F. 2d 884, 885-6 (5th Cir., 1978); *Anuszewski v. Dynamic Mariners, Panama,* 540 F. 2d 757, 758-9 (4th Cir. 1978);

2. The Ninth Circuit in *Santos v. Scindia Steam Navigation Co., supra,* and at least one panel of the Third Circuit in *Griffith v. Wheeling-Pittsburgh Steel Co., supra,* have adopted a standard based on a duty of a shipowner to exercise reasonable care under the circumstances of each case to protect longshoremen against danger;

3. Other Court of Appeals' decisions have focused on the question of whether the shipowner relinquished control of the stevedoring operations to the stevedore-employer of the injured longshoremen, as opposed to focusing on the reasonableness of the shipowner's conduct in light of his practical opportunities to discover and remedy defective conditions aboard his vessel. See *Cox v. Flota Mercante Grancolombiana, S. A.,* 577 F. 2d 798 (2nd Cir. 1978); *Hurst v. Triad Shipping Co.,* 554 F. 2d 1237, 1249-53 (3rd Cir. 1977); *Anderson v. Iceland S. S. Co.,* 585 F. 2d 1142 (1st Cir. 1978);

4. Even within the same Circuit, different panels have taken divergent views on the appropriate standard of care under Section 905(b). See *e.g.,* the different views expressed in *Canizzo v. Farrell Lines, Inc., supra,* and *Cox v. Flota Mercante Grancolombiana, S. A., supra,* within the Second Circuit, and *Hurst v. Triad Shipping Co., supra,* and *Griffith v. Wheeling-Pittsburgh Steel Co., supra,* within the Third Circuit.

Clearly, no clear direction has emerged from the myriad of cases decided by the various Courts of Appeals. However, a sufficient number of decisions have been issued by the Courts of Appeals to afford this Court a broad base upon which to distill an appropriate standard of care under Section 905(b). We submit that the formula distilled by the Ninth Circuit in *Santos* and a panel of the Third Circuit in *Griffith* is best suited to carry out the congressional intent underlying the 1972 amendments.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that a writ of certiorari issue to review and reverse the decision below.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A

Statute Involved

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., § 905(b) reads as follows:

> "In the event of injury to a person covered under this chapter by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX B

Portions of the Transcript of Record Setting Forth the Reasoning of the District Court in Granting a Directed Verdict

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* * *

THE COURT: We are aware, Mr. Gruber, that time and again vessels arrive with certain conditions, and once those conditions are made known to the stevedore then there is a burden on the part of the plaintiff, it seems to me, to establish that there was no way for that work to have been done in a safe manner. And therein lies the deficiency in your case. We have no evidence whatsoever that this work could not have been accomplished, this stowage could not have been accomplished in a safe manner, even stowing it with a list on the inshore side, on the low side. That is your deficiency in your case. You keep on arguing, but you are omitting the main point in the case, and that is the deficiency in your evidence.

MR. GRUBER: It seems to me, Your Honor, that Mr. Keeler testified that in his opinion it was not safe to work against the list, and it was not safe to work with the list, but we do have evidence, Your Honor. We have evidence from Mr. McKenna, the gang boss of 25 years' experience. He testified that the proper way to do this work was to work against the list.

THE COURT: But he also testified that he left the vessel because the condition was such that it required no special instructions to his men. It was a very common procedure, he testified.

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You see, this is the problem. You have a deficiency of evidence in your case. Mr. McKenna testified that he was not aboard the vessel at the time this occurrence took place.

MR. GRUBER: That's correct.

THE COURT: But there was nothing unusual. He had given no special instructions to his men. Nothing unusual. So, even assuming a list, apparently, it was a condition that didn't require any special instructions to his men, any special precautions. This is according to Mr. McKenna.

MR. GRUBER: But there is evidence both from Mr. McKenna, Mr. McBride, Mr. Dougherty and Mr. Keeler, whether or not it required any special precautions or anything like that, that loading in that direction under the conditions that existed would be a dangerous method of operation.

THE COURT: All right. That is your recollection. My recollection differs. So go ahead.

MR. GRUBER: Well, all right. But again, the evidence is that the stevedore wanted to do it in a specific way, which it felt was the safest way of doing it——

THE COURT: And you presented no evidence that that was in fact a safe way of doing it.

MR. GRUBER: I did present evidence, if I may say with all respect, Your Honor. The testimony of Mr. McKenna, a gang boss of 25 years' experience.

THE COURT: All right.

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MR. GRUBER: Who so testified.

I would say finally, Your Honor, here at my argument, that even if we assume that there was negligence on the

part of the stevedore, that that does not absolve the shipowner from responsibility. Because if we have a situation where the shipowner was negligent, and then the stevedore was negligent, if we have concurrent negligence, under my reading of the Lucas decision there is still responsibility and liability of the shipowner. He cannot escape responsibility for creating a dangerous condition, and then trying to get out of it because the stevedore doesn't correct the circumstance, doesn't correct the condition. And that is exactly what they are trying to do in this case. And I would submit that if we find a directed verdict in this case, then I think that might effectively lock the door on all of these cases, and I don't think that is what the intent of the Court was in the Brown decision, or any of the decisions that have come down.

Obviously there still has to be an area where negligence exists. We are trying to find that area. But in this case we clearly have a dangerous condition that existed, I submit, aboard the ship. We have the stevedore trying to do what he thought was the safest method of operation, instructed by the shipowner, "No, you don't do that, you do this. You work in the direction of the list." Now, if that is not negligence, I am not sure what would be negligence under the 1972 amendments.

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THE COURT: Well, Mr. Gruber, what you have proposed here is, with no expert testimony of any kind, except perhaps Mr. McKenna and Mr. Dougherty and Mr. McBride, is an alternative of working everything against the list, piling things up on the high side, loading on the high side, and we have no evidence that that would be a safer method of operation than one that was undertaken.

You see, this is one of the problems in the case. Common sense would dictate that constantly working against

that list, having things piled on the side that will have gravity push the load back down towards the workmen, would be a dangerous way of operating. So that no matter which way you operate here under these conditions, it requires some special precautions. And there is a deficiency in the plaintiff's case of evidence to establish that that was in fact a safer and more reasonable method of proceeding than the one that was used. Because no matter which method is used, even according to the plaintiff's evidence, if you worked against the list you would have a series of chocking procedures to use as you go along to prevent the pipe from spilling down and sliding down in the direction of the list. No matter which way you did it you have these constant precautions that must be taken.

And by the same token, you have precautions that must be taken when you are loading on the low side.

MR. GRUBER: What Your Honor has said, I think, it

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shows that there was—they were put in a position that there was no safe way to do the work. Now, the suggested one way of doing it, straightening out the ship, the evidence shows that no action was taken by the mate to straighten the ship out. And he admitted——

THE COURT: Well, you have said, and I defy you to show me where in the evidence this was done, I think you said that the mate was requested to straighten the list. In fact, all the evidence that there is in the case was that these men undertook to straighten out what they considered a list, and the mate stopped them from doing that particular procedure. There is no evidence, as I recall it, of any request by the stevedore to the ship for the ship to straighten out the list.

MR. GRUBER: Well, Your Honor, it may be that you are right on that, that there is no——

THE COURT: It isn't a question of maybe. It is indeed the fact.

MR. GRUBER: I don't remember precisely, but my recollection is that you are probably right, with all due respect, because I don't remember that specifically. But whether you are right or not, it seems to me is not the important thing here. The important thing here——

THE COURT: I think it becomes extremely important because it does present the alternative.

The testimony in the case reflects that if there is

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a condition on the vessel, when a vessel arrives, that requires correction, there is an alternative. Either the stevedore undertakes to do what is necessary to work under those conditions, or the stevedore requests the vessel to make the appropriate correction. It really devolves only to finally who is going to pay the stevedore to do the very thing that needs to be done. Because in most instances it appears that what has to be done is that after finding out what the cause of it is is to make a correction by perhaps restowing cargo, or whatever. But usually it means paying detention time and probably for the same work that would have to be done by the stevedore in any event.

MR. GRUBER: Well, that is true. But is Your Honor suggesting that there is a talismanic phrase, magic words that the stevedore has to say, "Please straighten out the list"?

THE COURT: It is really the question of whether a duty is created at some point. That is the problem.

MR. GRUBER: It seems to me a duty is created when the mate has knowledge or should have knowledge that the list exists and should realize that to work under those conditions is going to create a danger or hazard for the men that have to go into the hold, has the ability to take action and doesn't take action, whether he is asked to do so or not. And I think that is exactly what we have in this case, and I don't think it makes any difference whether they actually said, "Please help us straighten out this list" or they didn't.

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The evidence shows they must have known about the list and danger and did nothing about it to try to straighten out the list.

I think Your Honor has our argument, and there is little more than I can say. I think you see the arguments here. I submit that there is evidence that this case can go and should go to the jury.

THE COURT: Well, tell me precisely what should be submitted to the jury. First of all, of course there should be the question of whether a list exists. For the purpose of this argument, obviously we have to accept the fact that indeed a list exists.

Assuming that the list did exist, the problem that concerns me is this: You have presented no evidence that I can recall that the ship was requested to correct the condition. Work just started on four hatches; they went right ahead and proceeded to work. No evidence whatsoever that any attempt was made through the ship's boss, or otherwise, to request that some correction be made, or that some arrangement be made to correct whatever the condition might be. One must presume, therefore, under those circumstances that the stevedore was quite content

to proceed, that he was able to proceed and operate under the conditions that then existed So then this is the problem in the case.

MR. GRUBER: I would respectfully disagree with

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Your Honor. I think the best assumption you can make from what you just said is that at worst the stevedore should have asked for something to be done to straighten out the list, and maybe the stevedore is negligent for not doing so, maybe not. But we have to go back and look at what the duty of the shipowner is when he has knowledge of a dangerous condition.

THE COURT: You are using the talismanic phrase "dangerous condition."

MR. GRUBER: Yes.

THE COURT: The evidence on that score is precisely what? I asked you before what was the evidence that a five, six, or seven-degree list is a "dangerous condition" per se? Is there any evidence that a longshoreman, that stevedores cannot operate under such conditions and take the necessary precautions to operate safely under those conditions?

MR. GRUBER: Mr. Keeler himself said it would have been dangerous to work either way, either against or with the list.

THE COURT: With pipe that was intended to be released on the runner, with no means of holding it. Now that is my recollection. I don't recall his saying that there was no way that you could operate under those conditions.

MR. GRUBER: I think what was asked to him was: Would you consider it a safe operation to load pipe of this

size with a three or five-degree list, and there was no attempt to say,

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could you do it this way, could you do it that way, could you do it this way. His answer was that, no, after some thought on his part, he didn't think it would be a safe way of proceeding.

THE COURT: I simply have a distinct recollection quite to the contrary, and where that comes from I am not sure. Let me just check my notes. But I get no such impression that there was no way that one could operate under these conditions. And here again is whether I point to the deficiencies in the plaintiff's case. There was no evidence that this work could not be accomplished in a safe manner, even with a seven-degree list, which is the maximum I think that was testified to, seven degrees. Somewhere in that area, seven degrees, eight degrees, whatever it was.

But even assuming that, apparently this operation was proceeding, and in particular, in part of the plaintiff's own case, appears to be the judgment on the part of the hatch boss that the condition was one that was quite ordinary and common in the sense that it required no special instructions to his men. Do you recall that? He was not aboard the vessel and his answer was he gave no special instructions.

MR. GRUBER: I don't think you can infer from that it was an ordinary and common situation.

THE COURT: That is his testimony.

MR. GRUBER: That he said it was ordinary and common?

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THE COURT: That they knew how to handle this, there was nothing unusual about it. Words to that effect. I don't recall the precise words. I very definitely have the impression that when asked if he gave special instructions, he seemed quite perplexed: "No, I gave no special instructions. These men were experienced. They knew how to handle these things." Words to that effect.

MR. GRUBER: That's true. His men work under dangerous conditions every day. Let's face it, we know it is an extra hazardous activity, longshoring. We have special regulations to deal with it. I don't think there is any question the legislative history shows what a hazardous occupation it is.

THE COURT: The best your argument can be is that all that proved is that the hatch boss was negligent.

MR. GRUBER: No. I don't think that even says the hatch boss was negligent. I think all it shows is the hatch boss felt he did all he could in arguing with the chief mate or the mate about which way it should be done. When he did all he could do, he left it in the hands of his men to operate safely, and he left.

THE COURT: You mean not even to tell them, "Be sure to keep the wires on until you are ready to push it in the hold, until you are sure Mr. Dougherty is not between the pipe and the other pipes"?

You mean he could possibly think he had done all he could?

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MR. GRUBER: I guess he didn't know at that time that that situation was even going to come up.

THE COURT: What, that the pipe might possibly slide and fall, the same thing you say was the obviously dangerous condition?

MR. GRUBER: Yes, that is true. I suppose that is true, that is one of the reasons he thought it was dangerous to do it that way, I suppose, because just that sort of thing could happen, and that is the whole point of my argument, that by putting them in the position they had to work it that way, that what could have happened did happen. And sure, I suppose he could have told his men, "Be extra careful, don't let that pipe get out of your hands." That's assumed he has experienced men, they are supposed to be as careful as they can be, and by him telling them to be careful doesn't make it any better and doesn't make the ship any less responsible for putting them in that position of peril.

You keep coming back to one thing and I keep coming back to another, and I guess that is where the disagreement lies here.

THE COURT: Yes, I think so. I think it is a basic disagreement. And obviously the Court of Appeals is going to have to resolve this because your office is bound and determined to get the vessel back in. And with good justification, obviously. And it just seems to me that we keep ignoring the fact that there are the amendments, there has been a recognition that the stevedore

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is the expert, and presumably the one who knows how to cope with situations and deal with them. And the only problem, the only thing that gives me the slightest pause, is whether in my view of this situation I am in the slightest degree invading the jury's province. It is the one thing I am trying to be most careful and cautious about, which is

why I cautioned Mr. Putz. You must accept there was a list, you must accept there was a statement made to a mate, whoever that mate may have been, for this purpose, for the purpose of this argument, that there was a statement made to the mate that we are going to—or at least the mate was there when they started to move the pipe up, and the mate said, "Don't touch that. Stow it in the inshore side." That we must accept, and I am accepting all these things.

And then I am going further in trying to resolve every conflict in your favor in determining what evidence the plaintiff has presented here to establish that this was a "dangerous condition," i.e., a condition under which there was an unreasonable risk of harm, even assuming a proper and safe method of operation. This is where you and I have a disagreement. You are saying that because the condition creates a risk of harm the ship is negligent for failing to appreciate that the stevedore might negligently fail to operate in a safe fashion. And I say that nullifies what we have understood to be the requirement of the 1972 amendments that there be negligence of the vessel established separate and apart from the negligence of the stevedore.

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MR. GRUBER: And I submit, Your Honor, that if we assume that the condition is created through the negligence of the shipowner, or at least the condition exists——

THE COURT: Existed. I don't know why we talk about the negligence of the shipowner. If there is a list, there is a list, and there is no evidence as to what caused the list. So we can't say it was caused by the negligence of the vessel.

MR. GRUBER: In this case I submit that what you have just posed is exactly the situation contemplated by Section 302(a) which was looked on with favor in both Brown and Hurst, although I concede not expressly the subject of the holding.

THE COURT: Well, I think we will have to get that guidance from the Court of Appeals, because I think I would have to come to the conclusion that there is really no way I could submit this case to the jury. If I did, it would be more in the nature of an advisory opinion. I think if I were to reserve judgment it would only be for the purpose of entering the NOV in any event if the jury were to come in. And I think I would rather have it in a pure fashion resolved by the Court of Appeals.

Of course, there is some advantage to submitting it to the jury and have the jury resolve the factual issues. I have refrained from any comment about the factual issues because they are for the jury. But one must question of course this so-called list when the testimony is very clear that it took eight men to push this pipe into the "low side." But that is a jury argument.

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That is not for me.

I am trying to be as much of a devil's advocate as I can to see whether I should submit this to the jury. In my view there really is nothing. But I am trying to see is there anything at all here that could possibly be regarded by the appellate court as a factual issue to be resolved by the jury. And we get solely into the areas that I questioned you about: Number one, does the plaintiff have the burden to establish as part of his case that the condition was one which created an unreasonable risk of harm, i.e., one which, assuming a competent stevedore,

could not be carried out without still an unreasonable risk of harm. And here is where I think there is a deficiency, because although there is no testimony clearly on the point, Mr. Keeler's testimony touches on it, and that is that if this operation continued in the presence of a list, that you must not release the wires until the time you are ready to move the pipe into position. This is what I understood his testimony to be.

However, my recollection is not all that infallible either, and it is conceivable that he may have said that it would be dangerous under any circumstances to load cargo, particularly pipe, if there were that degree of list. And this is why if I seem to be arguing with myself, before it is too late, I am trying to determine whether I should or should not. But I say it is on that very, very fine line, and nothing more because I think in all other respects it is quite clear that the obligation is

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on the stevedore to operate under the conditions that are existing and to operate in a safe fashion. And you have not shown——

MR. GRUBER: All I can say, Your Honor, I do think there is evidence in this record from which a jury could conclude that to load against the pipe is an unreasonable and unsafe method of operation.

THE COURT: To load against the pipe?

MR. GRUBER: I am sorry, to load with the list. From the testimony both of Mr. Keeler and the three witnesses that we presented showing what is entailed, the hazards that are involved in doing it that way.

THE COURT: Do you have anything more you want to say, Mr. Putz?

MR. PUTZ: Your Honor, in citing Hurst and Minus v. Triad, counsel stopped short at Page 28, I believe, when he said that the Court of Appeals points to Sections 410 to 429 of the Restatement of Torts. The Court disposes of most of those sections, and in fact concentrates on Section 414, and in looking at Section 414, does not accept all of 414. It goes on to say, "Second Comment C to Section 414 indicates that the ultimate control over stevedoring operations retained by a shipowner is not the sort of control to which Section 414 is directed."

It then quotes from that section:

"The Court below cogently related the import of Comment C to the case at Bar when it said, 'thus at Comment C it

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points out an employer who retains only a general right to order the work stopped or resumed, and the right to inspect the progress of the work and to let me correct that to assure compliance with specification, owes no duty of care to the employees of the independent contractor concerning the manner in which his work is executed. Only when a significant degree of control is retained over the manner in which his work is performed is the duty under Section 414 triggered for vessel owners.' "

I do not believe there is any evidence that there is a significant degree of control.

Hurst v. Triad points to a couple of cases in which the district courts have in fact found obligation and duty upon the shipowner. One of the cases involves a situation where the third mate is actually in the hatch telling the men to put various weights to correct the list:

"Put one here, put one there, put one here."

That kind of control is not in fact indicated in this case. At most, we have a mate saying, "Do not break up a tight stow."

THE COURT: But he went further: "Start stowing from the inshore side."

MR. PUTZ: "Start stowing from the inshore side." Now we have evidence, and I believe it has to be accepted from Mr. Keeler, that in fact that work, as he assumed under the facts and circumstances from the plaintiff's case, progressed for at

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least eight two-thousand-ton sections of pipe without incident, and that work had to be safe or obviously safe without any knowledge or reason to know that it was unsafe, or that the men couldn't handle it.

The basic question is: Could they handle it under the circumstances. Plaintiff's own case shows that they did. None of those witnesses, plaintiff or the other two men, ever said, "Yes, a piece rolled prior to plaintiff's accident because of the list, or because we didn't control it, or because we let the wires go."

As far as the question of was there a proper method that this pipe could have been loaded given a seven-degree list, it was, I submit, not defendant's duty to establish that one way or the other. I think that falls on the plaintiff's side. And as I think the Court pointed out, the plaintiff has not proved that either through Mr. Keeler one way or the other.

I think Mr. Keeler said that given a situation where you had the pipe on the offshore side, and you were going to load pipe on the inshore side, with a seven-degree list, at best, that was the situation, and he did not know whether or not they could do it safely because it took the

expertise of the men, and he called into play the thoughts of, "Well, were these men experts, and could they in fact handle it, and did they know what do so," and he brought that element of the ship boss' expertise, and the hatch boss' expertise, and the individual longshoremen's expertise

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into play, and the question that was asked was general and not specific, asked by plaintiff's counsel and not by myself, and I don't think it was answered directly because he did not have enough information upon which to give a direct and definitive answer, and was not—the question was not followed up. I don't think the evidence is in the record.

Thank you, Your Honor.

MR. GRUBER: Your Honor, two sentences so I am as clear as I can be for the record. I submit it is the province of the jury to determine whether an unreasonably safe condition existed and that whether or not there is expert testimony or not it is still within the range, the ability of the jury, to determine from the facts presented to them in this case on this record they can make a determination as to whether having to load the pipe under those circumstances did create an unreasonably safe condition for the longshoremen.

THE COURT: Unreasonably dangerous.

MR. GRUBER: Unreasonably dangerous, I am sorry.

THE COURT: I might agree with you ordinarily. We place a great deal of faith always in the jury as the fact-finders. But it is quite apparent that we are in an area where one requires the guidance of some expert opinion. Just as under Pennsylvania law, and I believe we use the same thing, matters of medical complication which are not within normal human understanding and must have some expert opinion for guidance. I think the same

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thing is true when we are dealing in matters such as these. I think it is not a part of daily human experience to know the myriad things that these more expert people, these longshoremen and stevedores are required to do under most complicated circumstances in the loading and discharging of cargo from vessels. Indeed, I am sure that the lay person would be quite amazed to find some of the feats that these men are able to accomplish by the use of various type of rigging, and so forth. So, no, Mr. Gruber, I cannot agree with you in this circumstance. This is why I have had my reservation, that have you gone far enough, have you brought in any expert opinion to establish that with a seven-degree list there is no way of accomplishing this kind of a mission successfully and safely.

It appears to me, as a lay person, and if I may be forgiven, with some very slight experience from my Army days of having been involved with port operations, that there are many, many ways of accomplishing this safely. But I put that out of my mind because I am assuming the jury knows nothing about such procedures. And that being so, can I allow the jury to speculate that a seven-degree list per se is a dangerous condition which would preclude a safe operation by an experienced and competent stevedore. And I say that without that guidance the jury could only speculate. And I think your case is deficient in that regard.

I start with a premise which has been adopted apparently by the Court of Appeals, that the stevedore essentially

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has the expertise and the obligation to conduct the safe operation. There is no evidence whatsoever in this case

that the vessel's officers attempted in any way to control the manner of the loading operation. They did control the end result where cargo was to be stowed. That they did control. They did even dictate that the cargo stowage would have to start from the inshore side and out. But they made no efforts whatsoever to dictate or to control the manner in which the stevedore then undertook to carry out this obligation.

Now, I advert to one other factor, and that is the testimony that if there is a dangerous condition, that the stevedore has the obligation to bring it to the attention of the vessel and call upon the vessel to correct it. There is no evidence whatsoever in this case that that was done. And I say it leaves then the only reasonable alternative that the stevedore made the judgment that the stevedore could operate in a safe manner under the conditions then existing, even assuming this seven-degree list. And I am assuming all of those things, and I come to the conclusion, inevitably, that there is not enough evidence here to submit to the jury on the issue of control of the operation by the ship's officers. And having come to that conclusion, I really find nothing to submit to the jury.

I have attempted here to resolve every fact issue in favor of the plaintiff, and if I have failed, then the Court of Appeals will have to straighten me out as to in which particular

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area I invaded the jury's province. I can be wrong, of course, in my assessment of the plaintiff's obligation to establish by something in the nature of expert testimony that the condition existed, assuming a seven-degree list, was one which precluded a safe operation.

I must, and do grant the directed verdict. And I suggest that your further proceedings be direct.

MR. GRUBER: I agree, Your Honor.

Does Your Honor intend to write an opinion on this?

THE COURT: No, indeed. Just as in Henry, what I had to say I had said. I don't want to hurt you or help you.

MR. GRUBER: I understand.

THE COURT: What I have said I have said. If the Court of Appeals wants to give us further explanation of these complicated areas, we will certainly welcome it. There is a certain amount of confusion which remains. I had hoped that the Court of Appeals would create some precedent in the Henry v. Orient Lines case. Instead it did not write an opinion and did it only by judgment order, and that has no precedential value. This goes a step beyond Henry. In Henry the situation was simply that the ship's officer was present in the hold, was aware that the operation was a dangerous operation, just as the stevedore was aware it was a dangerous operation and did nothing to correct it or to stop it. And I ruled that under those circumstances a directed verdict for the defendant was dictated. This goes a step beyond

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that because we now have the further circumstances that there was a list in the vessel upon the vessel's arrival; that that created problems with respect to stowage of cargo, and particularly with cargo of the nature of pipe, which has the propensity to roll, and particularly because of its weight and length, and the ship's officers dictating where in the vessel it was to be stowed. So it does go beyond Henry, but nevertheless in my view required the plaintiff to produce evidence that with that list and with that cargo the condition was one which presented an unreasonable

risk of harm and one which could not have been overcome by a method of operation conducted by a competent, experienced stevedore. I think it required evidence, on your part, to establish that that could not have been accomplished in a way that did not present an unreasonable risk of harm.

I note further in entering this directed verdict that the cause of this action, and we would have a problem of causation here, was the fact that after a draft had been landed, and apparently after the wires had been removed, someone saw fit to question whether dunnage or plywood had been placed along the path for the pipe to travel over. And it was under those circumstances that Mr. Dougherty undertook to walk between the draft and the stowed pipe and this accident happened. Now this may have a bearing only on contributory negligence. It may also have a bearing on whether instructions by the stevedore as to when and under what circumstances movement should take place with a list

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in the vessel would have enabled this operation to be carried on in a safe fashion. This is why I commented on Mr. McKenna's testimony that he had not seen fit to give any instructions, any special instructions, notwithstanding the fact that there was a list in the vessel. So you may have a problem of causation in the case also, ultimately.

But primarily, my ruling is based on the fact that there is no evidence to establish that this operation could not have been conducted in a safe fashion by an experienced, competent stevedore given the seven-degree list.

MR. GRUBER: Thank you, Your Honor.

MR. PUTZ: Thank you, Your Honor.

* * *

APPENDIX C

Order of the District Court Directing Verdict for Defendant and Entering Judgment in Favor of Defendant

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1703

JOHN J. DOUGHERTY

v.

CHRISTIAN HAALAND

CIVIL JUDGMENT

Before Honorable Alfred L. Luongo

AND NOW, this 9th day of November 1977, in accordance with civil jury trial and defendant's motion for directed verdict upon conclusion of all the evidence, the Court having GRANTED said motion,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant Christian Haaland and against the plaintiff John J. Dougherty, together with costs.

By THE COURT:

ATTEST:

YATES
Deputy Clerk

APPENDIX D

Opinion of the District Court Denying Motion for a New Trial

[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1703

JOHN J. DOUGHERTY

v.

CHRISTIAN HAALAND

OPINION

LUONGO, *J.* SEPTEMBER 25, 1978

Plaintiff was injured on July 8, 1974, while working as a longshoreman on the M/S Concordia Tarek, which was moored at Girard Point in Philadelphia. On May 28, 1976, plaintiff instituted this tort action against the shipowner under the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act of 1927, 33 U. S. C. § 905(b) (Supp. V 1975). Jurisdiction is based solely on diversity of citizenship. The case was tried before a jury in November of 1977, and, at the close of plaintiff's case, defendant moved for a directed verdict. *See generally* Fed. R. Civ. P. 50(a). I reserved decision on

that motion until the close of all the evidence, at which time I granted the motion and discharged the jury. Plaintiff then made a timely motion for a new trial, asserting that I erred in directing a verdict for defendant. *See generally* Fed. R. Civ. P. 59(a). After considering carefully the points raised by plaintiff in support of his motion, I conclude, for the reasons set out in this opinion, that the motion must be denied.

In 1972, Congress completely overhauled the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA). *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972,

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Pub. L. No. 92-576, 86 Stat. 1263. By so doing, Congress "sought to achieve several goals: adequate, increased and sure compensation for injured longshoremen, elimination of the rubric of liability without fault for shipowners, and encouragement of safety within the industry by placing the duty of care on the party best able to prevent accidents" *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F. 2d 837, 839 (2d Cir. 1977) (Kaufman, J.).

Under the 1972 amendments, an injured longshoreman may no longer recover from the vessel for breach of an implied warranty of seaworthiness, as he formerly could under *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). *E.g., Samuels v. Empressa Lineas Maritimas Argentinas*, 573 F. 2d 884, 888 (5th Cir. 1978); *Briley v. Charente S. S. Co., Ltd.*, 572 F. 2d 498, 499 (5th Cir. 1978) (per curiam); *Davison v. Pacific Inland Navigation Co.*, 569 F. 2d 507, 511-12 (9th Cir. 1978). However, Congress did preserve the longshoreman's negligence action against the vessel. 33 U. S. C. § 905(b) (Supp. V 1975). Unfortunately, the statute fails to specify the standard of care to which the

vessel may be held, and, as a result, "the legal waters surrounding the question of the proper standard have swirled turgidly with confusion and controversy." *Davis v. Inca Compania Naviera S. A.*, 440 F. Supp. 448, 451 (W. D. Wash. 1977) (footnotes omitted). Although plaintiff here has proffered several different legal theories, I conclude that the evidence adduced at trial was insufficient to support a verdict for plaintiff under any of the potentially applicable standards of care, and that it was therefore proper to direct a verdict for defendant.

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In essence, this motion for a new trial raises only one issue, *i.e.*, whether plaintiff presented enough evidence to withstand defendant's motion for a directed verdict. In considering the instant motion, I shall of course view the evidence in the light most favorable to plaintiff, as I am required to do on a motion for a directed verdict. See *Patzig v. O'Neill*, 577 F. 2d 841, 46 (3d Cir. 1978); *Denney v. Siegel*, 407 F. 2d 433, 439 (3d Cir. 1969).

The evidence presented at trial may be summarized as follows. On the day of the accident, plaintiff was employed as a longshoreman on the Philadelphia waterfront. His employer was the Independent Pier Company, a stevedoring concern. On the day in question, plaintiff was a holdman with a hatch gang that was assigned to load sections of fifteen-inch diameter metal pipe, each about fifty feet long and weighing about half a ton, into the lower hold of the ship's number 3 hatch. As plaintiff boarded the ship at eight o'clock that morning, he noticed that it was listing to the inshore side. N. T. 18-19. The extent of this list was approximately five to eight degrees. N. T. 85, 106.

When the longshoremen opened the number 3 hatch, they saw that thirty tons of five-inch pipe, stacked two

tiers high, was already stowed in the offshore side of the lower hold. They decided that, in order to help correct the ship's list, they would stack up the thirty-foot sections of pipe into the wing, and then load the longer and heavier sections of pipe on the offshore side of the hold, alongside and inboard the thirty-foot sections. The

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longshoremen lowered a forklift into the lower hold, intending to use it to stack up the shorter pipe that was already stowed there, but an unidentified ship's mate instructed the hatch gang's foreman that the longer pipe was to be stowed on the inshore side of the hold. Edward McKenna, the foreman, argued with the mate, contending that it would be more logical to stow the pipe on the offshore side rather than on the inshore side, because the ship was already listing to the inshore side. The ship's mate insisted that the pipe be stowed on the inshore side, however, and McKenna instructed his men to do so.

The longshoremen then began to load the pipe into the inshore wing of the hold. They lowered and stowed without incident six or eight sections of pipe, in drafts of two each, although plaintiff continued to complain to his foreman about working the inshore side of the ship. N. T. 28. A ship's mate than asked McKenna whether his men were putting plywood between the sections of pipe being loaded and the steel deck of the lower hold. McKenna, who was on the upper deck, called down into the hold and instructed the men to put plywood under the pipe to keep it from sliding around. There was very little plywood in the hold at that time, and the holdmen asked that more plywood be sent down. Before this could be done, plaintiff picked up a piece that was already in the hold and attempted to place it under a section of pipe that had

just been lowered. The pipe was then resting on two wooden "chocks," and a holdman was steadying it at each end. One man apparently lost control

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of his end, and the pipe rolled inshore with the ship's list, striking and injuring plaintiff. N. T. 108.

It is undisputed that the ship's mate had the authority to direct where in the vessel particular cargo was to be stowed, and, in particular, to direct that the pipe taken on at Philadelphia be stowed on the inshore, rather than the offshore, side of the lower hold. N. T. 75, 143. It is also undisputed that the longshoremen exercised complete control of the loading operation, apart from the mate's direction that the pipe be stowed on the inshore side of the ship.

In light of the uncertainty surrounding the applicable standard of care in longshoremen's negligence actions under section 905(b), plaintiff has sought in his written submissions to bring the facts of this case within eight distinct theories of liability. Six of these theories are set out in various sections of the Restatement (Second) of Torts; the others are the unseaworthiness theory mentioned earlier and the *Gallardo* theory, derived from *Gallardo v. Westfal-Larsen & Co. A/S*, 435 F. Supp. 484 (N. D. Cal. 1977).

At the outset, it appears that three of the eight theories are in fact unavailable to plaintiff, and I will briefly address these three before considering whether the evidence adduced at trial warranted submitting this case to the jury under any of plaintiff's other theories of liability. First, as I noted earlier, an injured longshoreman may no longer recover from the vessel for breach of an implied warranty of seaworthiness. *See* cases cited *supra;* H. R. Rep.

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No. 92-1441, 92d Cong., 2d Sess. __-__ (1972), *reprinted in* [1972] U. S. Code Cong. & Admin. News 4698. 4701-05; S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-12 (1972). Second, although there is law in other circuits to the contrary, the Third Circuit has intimated that the duties imposed on possessors of land by sections 342 and 343 of the Restatement (Second) of Torts are not to be imposed on vessels. See *Hurst v. Triad Shipping Co.*, 554 F. 2d 1237, 1249-50 n. 35 (3d Cir.), *cert. denied*, 434 U. S. 861 (1977); *Brown v. Ivarans Rederi A/S*, 545 F. 2d 854, 863-64 n. 10 (3d Cir. 1976), *cert. denied*, 430 U. S. 969 (1977). *Accord, Canizzo v. Farrell Lines, Inc.*, No. 77-7292, slip op. at 3210-11 (2d Cir. June 2, 1978) (Friendly, J., dissenting in part), *petition for cert. filed*, 47 U. S. L. W. 3148 (U. S. Aug. 30, 1978) (No. 78-358).[1] *Contra, e.g., Brown v. Mitsubishi Shintaku Ginko*, 550 F. 2d 331 (5th Cir. 1977) (Wisdom, J.); *Gay v. Ocean Transp. & Trading Co.*, 546 F. 2d 1233 (5th Cir. 1977). Third, the *Gallardo* analysis, while not unpersuasive, diverges in important respects from the Third Circuit's analysis of the vessel's duties under section

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905(b). These considerations led Chief Judge Lord to reject the *Gallardo* analysis in a recent opinion, and I am

1. Judge Friendly's observations bear repeating here:

> "In retrospect it seems to have been a mistake for courts to give such talismanic significance to §§ 343 and 343A of the [Restatement (Second)] as has sometimes been done. These sections are awkwardly drafted; the framers had no notion that they would be applied to the tangled situations of ship loading or unloading; and they must be read together with [§§ 409-29 of the Restatement (Second)]. In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 amendments."

Canizzo v. Farrell Lines, Inc., supra, slip op. at 3210-11 (footnote omitted).

entirely in agreement with his conclusion. *See Blackburn v. Prudential Lines, Inc.*, No. 76-3554, slip op. at 2-6 (E. D. Pa. July 19, 1978). Accordingly, I turn to plaintiff's five remaining theories of liability.

In considering whether defendant could properly have been found liable here, I start from the general proposition that the stevedore is an independent contractor possessed of special expertise in the loading and unloading of cargo. Congress, in enacting the 1972 amendments to the LHWCA, chose to place primary responsibility for the longshoremen's safety on the stevedore, "the party best able to prevent accidents." *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F. 2d 937, 939 (2d Cir. 1977); *see, e.g., Marant v. Farrell Lines, Inc.*, 550 F. 2d 142, 144 (3d Cir. 1977); *Brown v. Ivarans Rederi A/S*, 545 F. 2d 854, 860 (3d Cir. 1976), *cert. denied*, 430 U. S. 969 (1977). *See generally* 33 U. S. C. § 941(a) (1970). Thus, the vessel will ordinarily be justified in assuming that the stevedore and its employees, *i.e.*, the longshoremen, can safely perform the required loading or unloading operations, even under conditions that would be dangerous to those not experienced in the calling. At least this is so where, as here, no latent or concealed dangerous conditions exist aboard ship. In short, an injured longshoreman seeking to impose liability on the vessel under section 905(b) must show that the vessel was negligent in relying upon the stevedore's expertise and in assuming that the work could be safely done by the stevedore. This

[8]

in turn requires a showing that (1) the conditions aboard ship created an unreasonable risk of harm, even for a longshoreman working under the guidance of an expert stevedore, and (2) the vessel, although not possessed of the

stevedore's expertise, knew or should have known of this unreasonable risk of harm. *Cf. Davison v. Pacific Inland Navigation Co.*, 569 F. 2d 507, 513-14 (9th Cir. 1978) (no evidence that defendant knew or should have known that cargo could not be safely discharged from barge due to its design; judgment against defendant reversed). *See generally* Restatement (Second) of Torts § 289 (1965).

RESTATEMENT (SECOND) § 410

Plaintiff relies initially on section 410 of the Restatement (Second), which provides:

> "The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself."

Hurst v. Triad Shipping Co., 554 F. 2d 1237, 1248-53 (3d Cir.), *cert. denied*, 434 U. S. 861 (1977), suggests that this rule is part of the federal common law that governs an injured longshoreman's negligence action against the vessel. Section 410, of course, carves out an exception to the general rule that an employer is not liable for the negligence of an independent contractor he employs. See Restatement (Second) of Torts § 409 (1965). This section deals with an employer's liability for negligently directing an independent contractor to do work that "is dangerous in itself, or dangerous

[9]

because of the manner in which it is directed to be done." Restatement (Second) of Torts § 410, Comment a (1965).

Plaintiff suggests that the jury here might have found that the task assigned to plaintiff's hatch gang—the loading

of additional cargo on the inshore side of the ship—was unreasonably dangerous in view of the ship's inshore list, and that defendant was therefore negligent in directing the longshoremen, who were employees of an independent contractor (the stevedore), to proceed in that manner. I believe, however, that such a jury determination would not be supportable on the evidence that was presented here.

In light of my earlier general observations, the proper inquiry under section 410 is two-fold: (1) Did the mate's instruction give rise to an unreasonable risk of harm to the longshoremen, notwithstanding that they were working under the direction of an expert stevedore? (2) If so, did defendant know, or should it have known, of this unreasonable risk of harm?

With regard to the first question, I expressed considerable doubt at the time of trial that plaintiff had presented enough evidence to warrant submitting this issue to the jury. Although I remain doubtful, I recognize that the following exchange between plaintiff's counsel and Paul J. Keeler, a maritime consultant called as a defense witness, arguably could support a jury finding that an experienced stevedore could not have safely carried out the mate's instruction:

> "Q. And would it be a safe practice in your opinion for the mate on that vessel to direct the longshoremen
>
> [10]
>
> to work in the same direction as a five-degree list?
>
> . . .
>
> A. To work in the direction, you mean on the low side of the list, or the high side?
>
> Q. The low side.
>
> A. With what kind of cargo?

Q. The 15-inch pipe we talked about in this case.
A. With how much list, three degrees?
Q. Five degrees, first.
A. *No way.*
Q. Now three degrees.
A. Well, I would say three degrees, with 15-inch pipe would not be a good practice either."

N. T. 197 (emphasis supplied).

With regard to the second aspect of plaintiff's case, however, I am thoroughly convinced that the evidence presented was insufficient to support a verdict in plaintiff's favor. Plaintiff offered no evidence whatever tending to show that the shipowner knew, or should have known, that an experienced stevedore could not safely load this cargo on the inshore side of the ship, given the ship's inshore list.

I note at the outset that plaintiff could not have carried his burden here except by presenting *expert* testimony that the shipowner knew, or should have known, that the stevedore would be unable to operate safely to accomplish the result prescribed by the mate. True, the jury generally is permitted to determine, without the aid of expert testimony, whether an actor should have known that

[11]

his conduct exposed another to an unreasonable risk of harm. *Compare* Restatement (Second) of Torts § 289 (1965) *with id.* § 328C(b). In the context of a longshoreman's negligence action, however, the question whether the vessel knew, or should have known, that the stevedore would be unable to operate safely in light of certain conditions aboard ship cannot be answered without some fairly specific knowledge of the relationship among the

vessel, the stevedore, and the longshoremen. The trier of facts usually will need to know, for example, how the responsibility for the safe conduct of loading operations is allocated between the vessel and the stevedore. In particular, the trier of fact will need to know the extent to which ships' officers generally may be charged with knowledge of the stevedore's ability, or inability, to safely perform loading operations under various conditions. These matters clearly lie outside the common knowledge and experience of ordinary persons. Consequently, the jury *must* receive guidance from persons with special knowledge of, or experience in, these matters if it is to appraise the situation accurately. *Cf., e.g., Robinson v. Wirts,* 387 Pa. 291, 297, 127 A. 2d 706, 710 (1956) (Sertn, C. J.) (because jurors in medical malpractice case "would presumably lack the necessary knowledge and experience to render a just and proper decision, they must be guided by the testimony of witnesses having special or expert qualifications"); *Ragan v. Steen,* 229 Pa. Super. 515, 331 A. 2d 724 (1974) (same).

Plaintiff argues here, as he originally did in opposing the directed verdict, that Mr. Keeler's testimony provided a basis for the jury to determine that the shipowner was negligent.

[12]

I fail to see how Mr. Keeler's testimony could support such an inference. Mr. Keeler did not testify that the ship's officers *actually* knew that the operating conditions presented an unreasonable danger to the stevedore, nor did he testify that the ship's officers *should* have known of the alleged danger. Rather, Mr. Keeler simply gave his own expert opinion that the holdmen were working under dangerous conditions, and he never addressed the

question whether the ship's officers should have perceived that these conditions were unreasonably dangerous.

Mr. Keeler's testimony consistently reflected the view that the stevedore, rather than the ship's personnel, is primarily responsible for conducting operations safely. Thus, Mr. Keeler testified that the ship's boss, the highest-ranking employee of the stevedore, makes a preliminary inspection of the ship before any of his men board it, and that if he observes any grave safety hazards, it is up to him to insist that they be rectified before his men begin work on the ship. N. T. 154-57, 199-200. Mr. Keeler also specifically testified that, if a ship's boss observes a list that makes its dangerous for his men to load cargo, he is then obliged to order that work be halted until the list is corrected, rather than to permit his men to "work out" the list by rearranging cargo. N. T. 155-56. There was no testimony here that the ship's boss ever complained about the list, or that *anyone* requested on behalf of the stevedore that the ship itself

[13]

correct the list.[2] The ship's officers evidently assumed, from the absence of such complaints or requests, that the stevedore would be able safely to perform the loading operation, notwithstanding the ship's list. Plaintiff offered no evidence, expert or otherwise, that this assumption was unreasonable, *i.e.*, that the ship's officers knew, or should have known, that the holdmen were in fact working under unreasonably dangerous conditions.

2. Mr. McKenna, plaintiff's hatch boss, simply requested that his men be permitted to try to correct the list themselves. In light of Mr. Keeler's uncontroverted testimony that 30 tons of cargo in the lower hold would have had absolutely no effect on the vessel's list, it appears that the longshoremen's proposed course of action would have proven completely ineffective. N. T. 162-70.

Plaintiff points to the deposition testimony of Captain Lars Vedo, the chief officer aboard the M/S Concordia Tarek on the day of the accident. The following excerpt from Captain Vedo's testimony on cross-examination is pertinent here:

"Q. . . .

I want you to assume that there was in fact a list to the inshore or port side during the morning of July 8, 1974. I want you . . . to also assume that the stevedore hatch boss *asked permission* from the deck officer who was on hand at Number 3 [hatch] to take corrective action in order to adjust this list.

Now, assuming those facts, what would be the normal course for the deck officer on duty at that time?

MR. PUTZ: I'll object. I don't know what you mean by 'normal course.' You mean, would he come to this witness; would he give authority? What would he do?

MR. GRUBER: That's right.

[14]

MR. PUTZ: I see.

THE WITNESS: We would straighten up the ship.

BY MR. GRUBER:

Q. Straighten up the ship?
A. Yes."

N. T. 68-69 (emphasis supplied).

Without belaboring the point, I fail to see how Captain Vedo's apparently unresponsive testimony could support an inference that the shipowner was negligent

here. At the most, the jury might have inferred from the testimony quoted above that the ship's mate should have interpreted McKenna's request that his men be permitted to work the offshore side, in an effort to correct the list, as a request that the vessel *itself* correct the list, and further that such requests, if made, are normally granted. Even if the jury drew both of those inferences, however, it would still have had no basis for charging the vessel's officers with knowledge that it was unreasonably dangerous to load the cargo on the inshore side, given the ship's inshore list. There was no testimony that McKenna communicated to the mate any concern about the *safety* of working the inshore side of the ship, nor was there any evidence that a request to straighten up the vessel generally is made only where the stevedore believes the list is dangerous, rather than simply inconvenient. Accordingly, without the aid of additional expert testimony, the jury would have had to resort to pure speculation in order to infer from McKenna's

[15]

request that the vessel should have known that it was unreasonably dangerous to load the cargo on the inshore side, given the ship's inshore list. Plaintiff therefore was not entitled to go to the jury under section 410 of the Restatement (Second).

RESTATEMENT (SECOND) § 414

Plaintiff also relies on section 414 of the Restatement (Second) of Torts (1965), which provides:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Once again, *Hurst v. Triad Shipping Co.*, 554 F. 2d 1237, 1251-52 (3d Cir.), *cert. denied,* 434 U. S. 861 (1977), suggests that section 414 is part of the federal common law that governs longshoremen's negligence actions under the LHWCA.

Plaintiff contends that the shipowner here retained control of the loading operation, in that the ship's mate directed the holdmen to stow the pipe on the inshore side of the ship. Defendant, by way of response, argues that the holdmen were free to use any method they chose in stowing the pipe, and to take any safety precautions they thought appropriate, so that it did not retain "control" over the work within the meaning of section 414. I agree that defendant here did not retain "control" of the work within the meaning of section 414. To begin with, the panel in *Hurst, supra,* expressly held that the shipowner's ultimate control over stevedoring operations, *i.e.*, its power to halt the operations

[16]

at any time, does not amount to "control" as that term is used in section 414. 554 F. 2d at 1251. The *Hurst* panel noted that a contrary rule would effectively impose on the vessel a nondelegable duty to supervise stevedoring operations, and that the legislative history of section 905(b) made it plain that Congress sought to preclude the imposition of nondelegable duties on shipowners. *Id.*

Here, of course, plaintiff does not rely solely on defendant's ultimate power to terminate stevedoring operations. Rather, he emphasizes its direction that the pipe be stowed on the inshore wing of the hold. However, in view of the testimony here that the vessel generally determines where each particular part of its cargo is to be

stowed, I cannot agree that mere control over where cargo is stowed, without more, amounts to control of the loading operation itself. The vessel, by specifying where the cargo is to be stowed, in effect requires the stevedore to accomplish a particular result. Yet the employer of an independent contractor generally does not retain control of the work simply by specifying the result that the contractor must accomplish. Although the stevedore is required to load the cargo in a certain location, it nevertheless remains "entirely free to do the work in [its] own way." Restatement (Second) of Torts § 414, Comment c (1965). Thus, it may direct its employees to use certain equipment, or to take special precautionary measures, in order safely to accomplish the job. The stevedore, in short, retains control of the work. *See, e.g., Wescott v. Impresas Armadoras, S. A. Panama*, 564 F. 2d 875, 882-83 & n. 8 (9th Cir. 1977).

[17]

I realize that in some unusual cases, the vessel's direction to stow cargo in a particular location may, as a practical matter, leave the stevedore with little or no control over how the task is to be carried out. For example, a mate's direction to stow an oddly-shaped ten-ton counterweight in a narrow space between two other items of cargo may entail a direction to stow the weight in a particular position, if the weight cannot practically be stowed in any other way. *See Butler v. O/Y Finnlines, Ltd.*, 537 F. 2d 1205, 1208 (4th Cir. 1976) ("[i]nherent in the mate's choice of *where* . . . was a direction as to *how*"). Under circumstances such as those, it might properly be said that the vessel retains control of the work, and the vessel might properly be held liable for a negligent direction. In this case, however, no evidence was presented to show that the mate's direction to load the inshore side

of the hold effectively dictated the method by which the stevedore would accomplish that task. There was, therefore, no evidence to support a finding that the shipowner retained control of any part of the work, and it consequently cannot be held liable under section 414.

RESTATEMENT (SECOND) § 302A

Plaintiff also seeks to impose liability on the shipowner under section 302A of the Restatement (Second), which states that "[a]n act . . . may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent . . . conduct of the other or a third person."

[18]

In short, plaintiff contends that the mate's order to load the pipe on the inshore side of the ship created an unreasonable risk of harm to plaintiff because of the likelihood that plaintiff or other members of his hatch gang would act negligently in carrying out that order. *Brown v. Ivarans Rederi A/S*, 545 F. 2d 854, 863 (3d Cir. 1976), *cert. denied*, 430 U. S. 969 (1977), suggests that section 302A is part of the federal common law governing longshoremen's negligence actions under the LHWCA. On the evidence presented here, however, plaintiff was not entitled to go to the jury under section 302A. There was no evidence here that defendant knew that the holdmen were likely to be careless in loading the cargo on the inshore side of the ship, nor was there any evidence to support an inference that defendant should have foreseen the likelihood of negligence on their part.

RESTATEMENT (SECOND) § 305

Plaintiff also invokes section 305 of the Restatement (Second), which provides that "[a]n act may be negligent

if the actor . . . should realize that it is likely to prevent, another or a third person from taking action which the actor . . . . should realize is necessary for the aid or protection of the other." In short, plaintiff urges that the mate's instructions to the holdmen prevented them from working *against* the ship's list, and that working against the list was necessary for the aid or protection of plaintiff. Section 305 is apparently part of the federal common law that governs longshoremen's negligence actions under the LHWCA.

[19]

See *Brown v. Ivarans Rederi A/S*, 545 F. 2d 854, 863 (3d Cir. 1976), *cert. denied*, 430 U. S. 969 (1977). On the evidence presented here, however, section 305 does not aid plaintiff's case. Indeed, plaintiff's contention here—that the shipowner exposed plaintiff to an unreasonable risk of harm by preventing the holdmen from working in a safe manner (*i.e.*, by loading the offshore side of the ship)—is essentially the same contention he raised under section 410 of the Restatement (Second), *i.e.*, that the vessel was negligent in directing the holdmen to work the inshore side of the ship. I have already noted, however, that the evidence offered at trial was insufficient to permit a jury determination that the vessel was negligent in this regard, and the same conclusion obtains here, notwithstanding that plaintiff's theory of negligence under section 305 differs slightly from his theory under section 410.

The fact of the matter is that the ship's list created a danger for the longshoremen, whether they worked *with* the list or *against* it. Mr. Keeler's testimony, upon which plaintiff relies so heavily, clearly established that loading the pipe against the list, as plaintiff contends he should have been permitted to do, would itself have been a

dangerous undertaking, perhaps even more dangerous than working *with* the list. N. T. 166-72, 192-97.

RESTATEMENT (SECOND) § 452(1)

Finally, plaintiff apparently seeks to recover under section 452(1) of the Restatement (Second) which provides that, in general, "the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a

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superseding cause of such harm." However, section 452 (1) does not in and of itself impose liability on the actor for his negligent conduct; it simply provides that a third person's failure to act "does not *relieve* the actor of liability for the harm which he has in fact caused." Restatement (Second) of Torts § 452, Comment a (1965) (emphasis supplied). Thus, section 452(1) does not become applicable until it appears that the actor was in fact negligent and that he seeks to avoid liability for his conduct on the ground that a third party's failure to act was a superseding cause of the harm that the actor caused. As I have already noted, plaintiff has failed to establish defendant's negligence in the first instance, and so section 452(1) cannot avail him here.

In sum, then, I find that the evidence presented here was insufficient to permit a jury to find in plaintiff's favor under any of the potentially applicable theories of liability that he advances. Defendant was therefore entitled to the direction of a verdict in its favor. Inasmuch as plaintiff's motion for a new trial is premised entirely on the asserted error in directing a verdict for defendant, I conclude that plaintiff's motion must be denied.

/s/ ALFRED L. LUONGO, *J.*

APPENDIX E

Order of the District Court Denying Motion for a New Trial

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1703

JOHN J. DOUGHERTY

v.

CHRISTIAN HAALAND

ORDER

This 25th day of September, 1978, it is

ORDERED that Plaintiff's Motion for a New Trial is DENIED.

/s/ ALFRED L. LUONGO, *J.*

APPENDIX F

Judgment Order of the U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2575

JOHN J. DOUGHERTY,
Appellant

v.

CHRISTIAN HAALAND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 76-1703

Argued July 13, 1979

Before: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

By THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: July 17, 1979

Certified as a true copy and issued in lieu of a formal mandate on August 8, 1979.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX G

Opinion of the U. S. Court of Appeals for the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel Corp.

[1]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL CORPORATION, et al.

THOMAS W. GRIFFITH,
Appellant in No. 78-2159

WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant in No. 78-2160

AMERICAN COMMERCIAL LINES, INC.,
Appellant in 78-2161

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 73-0706)

Argued June 7, 1979

Before GIBBONS, WEIS and HIGGINBOTHAM, *Circuit Judges*

(Opinion filed August 24, 1979)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Thomas W. Griffith, an employee of Wheeling-Pittsburgh Steel Corporation (Wheeling) commenced this action in August 1973 against his employer, and against American Commercial Lines, Inc. (American), the owner of barge No. 2730, pursuant to § 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. 33 U. S. C. § 905(b). He sought damages

for injuries sustained on May 26, 1973 when he fell into the hold of barge No. 2730. Both defendants denied liability to Griffith, and each cross-claimed against the other for indemnification and contribution. Both also moved for summary judgment against Griffith and against each other on their respective cross-claims. The district court granted Wheeling's motion for partial summary judgment, dismissing Griffith's negligence claim against Wheeling, and barring any claim for contribution or indemnity by American against Wheel-

[3]

ing.[1] The order granting partial summary judgment was entered as a final judgment, and this court then considered appeals by Griffith and American from that order. We reversed and remanded for further proceedings consistent with our opinion.[2]

Following a non-jury trial the district court held both Wheeling and American liable to Griffith on a negligence theory. It further found that Griffith had suffered compensatory damages in the amount of $209,299.45, but reduced his recovery by 25% because it found that 25% of those damages was attributable to Wheeling's negligence in a stevedoring capacity. On June 15, 1978, the court entered judgment against American for $104,649.73 (50% of Griffith's damages) and against Wheeling for $52,324.87 (25% of those damages) a total of $156,974.60.[3] All parties

1. Griffith v. Wheeling Pittsburgh Steel Corp., 384 F. Supp. 230 (W. D. Pa. 1974).

2. Griffith v. Wheeling Pittsburgh Steel Corporation, 521 F. 2d 31 (3d Cir. 1975), *cert. denied,* 423 U. S. 1054 (1976) (*Griffith I*). The *Griffith I* court affirmed the district court's holding that Griffith was not a Jones Act seaman, and therefore had no Jones Act remedy against either defendant. 521 F. 2d at 36-38.

3. Griffith v. Wheeling-Pittsburgh Steel Corp., 452 F. Supp. 841 (W. D. Pa. 1978).

appeal from this final judgment. Once again we must remand for further proceedings.

I. Facts

The facts respecting Griffith's employment in the Wheeling common labor pool at Allenport, Pennsylvania, his assignment on the day of the accident to work with a barge crew at the river landing, and the happening of the accident are detailed in our previous opinion. That appeal reviewed the summary judgment record. The trial court's findings of fact after the trial confirm that statement in all material respects, and we repeat it here.

Appellee Wheeling-Pittsburgh Steel Corporation (Wheeling) operates a steel mill along the banks of the Monongahela River at Allenport, Pennsylvania.

[4]

It first employed appellant Thomas Griffith on February 11, 1973, about four months before the date of the injury that was to become the subject of this action. He worked out of a common labor pool in the construction department and was assigned on a daily basis to a variety of landbased jobs. On April 1, 1973 Griffith bid into the hot mill labor pool, where as before he was assigned to various jobs on a daily basis. As part of this pool he was assigned to work at the company's barge landing on the river for a total of 3¾ days including the date of the accident on May 26, 1973.

On that day, plaintiff was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant-appellant American Commercial Lines, Inc. (American). Three

days earlier, on May 23, it had been delivered to Wheeling and was incorporated into the latter's "coal fleet" to await future use. On May 25, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

On the morning of the day of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known as "rounding" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole as-

[5]

sistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 p.m. Allfree directed the crew to stop loading the barge and to close the

> covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had difficulty closing one of the covers. A cable was attached from the crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

521 F. 2d at 34-35.

II. Griffith's Appeal

Griffith's appeal contests the reduction of his recovery to $156,974.60. Griffith's § 905(b) claims were against the barge owner, American, on the theory that it had negligently furnished Wheeling a defective barge, and against Wheeling as owner *pro hac vice* for negligently directing him to work on that unsafe barge. As noted, the trial court found in Griffith's favor on both of these claims. Both Wheeling and American contest liability to Griffith, and their contentions are addressed in Parts III and IV below. But neither contests the district court's finding of fact that

> [6]
>
> Griffith suffered $209,299.45 in compensatory damages. Nor does either contend that Griffith, himself, was guilty of any negligence which contributed to the accident. In this Part we address the reduction of Griffith's damages on the

assumption that the trial court's liability determinations in Griffth's favor are correct.

The court found that American was negligent in delivering a barge with defective cover mechanisms, knowing that workers such as Griffith would be exposed to risk of injury for those defects. It found that Wheeling, in its capacity as owner *pro hac vice* of the barge, was negligent in failing to give adequate instructions to steelworkers unfamiliar with river work, in providing a defective barge for such work, and in failing to inspect, repair, or reject the defective barge. It also found that in its stevedoring capacity, as distinguished from its capacity as owner *pro hac vice*, Wheeling was liable for the negligence of its employees, Griffith's fellow servants. The court allocated the responsibility for Griffith's injuries 50% to American, 25% to Wheeling as owner *pro hac vice*, and 25% to Wheeling as stevedore. It then applied what has become known as the equitable credit doctrine to reduce Griffith's total recovery by 25%, representing the negligence attributable to his employer, Wheeling, acting in its capacity as stevedore.

In adopting the equitable credit doctrine the trial court decided the question which this court expressly reserved in *Marant v. Farrell Lines, Inc.*, 550 F. 2d 142, 147 (3d Cir. 1977). The theory behind that doctrine was that when Congress in the 1972 Amendments to the LHWCA eliminated the shipowner's strict liability to longshoremen for unseaworthiness, and at the same time created in § 905(b) a new negligence cause of action against the shipowner, it did not intend to impose liability upon the shipowner for that part of the longshoreman's damages attributable to the negligence of the longshoreman's employer. The workman's compensation remedy was said to cover that percentage of the damages. This statutory compensation

[7]

was characterized as equitable in recognition of the fact that under § 933(c) of the Act the stevedore employer had a lien on the employee's third party recovery. Thus, in the absence of a credit principle, the stevedore might in some cases be fully repaid for its workmen's compensation payments by the shipowner, although its own employees were significantly responsible for the injury. The shipowner would then be left to bear the burden of the longshoreman's damage recovery, despite its lesser responsibility. It was thought to be equitable to prevent this result by reducing the longshoreman's negligence recovery in proportion to the percentage of the stevedore's negligence.

In *Edmonds v. Compagnie Generale Transatlantique*, 47 U. S. L. W. 4868 (U. S. June 27, 1979), the Supreme Court reversed an *en banc* decision of the Fourth Circuit [4] which had applied the equitable credit doctrine to reduce a negligence recovery in a § 905(b) action against a shipowner by a percentage equal to the proportionate fault of the longshoreman's employer. The Court held that Congress did not intend to modify the longshoreman's preexisting right to recover for his injuries in full against a negligent shipowner, even in cases where the negligence of the stevedore contributed to the injury. Whatever the conduct of the longshoreman's employer, a negligent shipowner is liable for the full amount of the longshoreman's damages. Justice White for the Court recognized that by virtue of the stevedore employer's compensation lien on the employee's third party recovery the *Edmonds* result may relieve a negligent stevedore even of the burden of statutory compensation payments, 47 U. S. L. W. at 4871,

4. Edmonds v. Compagnie Generale Transatlantique, 577 F. 2d 1153, 1155-56 (4th Cir. 1978) (*en banc*).

but found that circumstance was not decisive. So much for equitable credit.

Thus unless both Wheeling and American can prevail in their appeal on liability issues, a judgment must be entered in favor of Griffith against one or both in the full amount of $209,299.45.

[8]

III. American's Appeal Against Griffith

The district court held that American, as owner, had breached its duty to exercise reasonable care by delivering barge No. 2730 to Wheeling with its cover mechanisms rusted, bent, and unlubricated, and with the eyelets on the stuck hatch cover completely missing. The court concluded that "[d]elivery of such a barge, with knowledge that many workers would necessarily come into contact with the deteriorated barge covers, was inexcusably negligent." 452 F. Supp. at 845.

In reaching this conclusion, the trial court considered at some length the applicable standard of care. It recognized that some prior cases [5] had relied upon §§ 343-343A of the Restatement (Second) of Torts (1965), dealing with the liability of landowners and occupiers, as defining the standard of care applicable to vessel owners under § 905(b) of the Amendments.[6] It concluded, however,

5. *E.g.*, Lubrano v. Royal Netherlands Steamship Co., 572 F. 2d 364 (2d Cir. 1978); Gay v. Ocean Transport & Trading Ltd., 546 F. 2d 1233 (5th Cir. 1977); Anuszewski v. Dynamic Mariners Corporation, Panama, 540 F. 2d 757, 759 (4th Cir. 1976) (per curiam), *cert. denied*, 429 U. S. 1098 (1977).

6. Those sections read as follows:

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

that the application of that formulation would introduce into the maritime torts area distinctions between licensees and invitees which would be inappropriate in the context of commercial shipping. Relying on the Supreme Court's decision in

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Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 625 (1959), the court discerned an emerging trend in the law toward imposing upon property owners a more general "duty to exercise reasonable care under all the circumstances of the case." 441 F. Supp. at 844. The court also observed that in most cases, including the case *sub judice*, the same result would be reached whether one applied the Restatement § 343 formulation or the more universal duty to exercise reasonable care under all the circumstances. The court therefore concluded that the latter standard was the proper one to apply.

On appeal, American urges that the standard adopted by the district court "leads to an improper imposition of

6. (Cont'd.)

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

liability in this case and provides no real guidance for the decision of future cases." We are less concerned with the latter objection than with the former, and we conclude that the facts found by the trial court justify imposition of liability on the vessel owner in this case.

A brief review of this court's prior decisions discussing the standard of care under § 905(b) will serve as background for our review of the district court's decision. In *Griffith I, supra*, we pointed out, first, that the clear intent of amended § 905(b) was to relieve vessel owners of absolute liability for injuries to stevedores, whether that liability was imposed on the basis of unseaworthiness or on a *respondeat superior* theory. 521 F. 2d at 40. At the same time, we recognized the apparent intention of Congress "to apply land-based common law negligence principles on a uniform national basis" in actions against the vessel owner under § 905(b). *Id.* at 44 & n. 21. We did not at that time undertake to specify the principles to be applied to the record on remand.

This court's subsequent decisions have concentrated upon clarifying the implications of Congress' rejection in § 905(b) of strict or *respondeat superior* liability as a basis for recovery against the vessel owner. In *Brown v. Ivarans Rederi A/S*, 545 F. 2d 854 (3d Cir. 1976), *cert. denied*,

[10]

430 U. S. 969 (1977), we concluded that § 416 of the Restatement (Second) of Torts, which imposes a non-delegable duty of due care upon persons employing a contractor to perform work "dangerous in [the] absence of special precautions" was inconsistent with the intent of Congress to eliminate shipowner liablity without fault. Similarly, in *Marant v. Farrell Lines, Inc., supra,* we reversed a judgment for the longshoreman, because the jury had been instructed that "responsibility for the safety of

the longshoreman lies concurrently or jointly" with the stevedore and the shipowner. Relying on *Brown*, we held that "the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." 550 F. 2d at 144 (quoting *Brown, supra*, 545 F. 2d at 860). And in *Hurst v. Triad Shipping Co.*, 554 F. 2d 1237 (3d Cir.), *cert. denied*, 434 U. S. 861 (1977), we held that §§ 318 and 416-429 of the Second Restatement were inapplicable in a § 905(b) action, again on the basis that each would have resulted in the imposition upon the shipowner of liability without fault. We held that § 414 of the Restatement, which permits imposition of liability upon a principal who retains control over some part the work performed by an independent contractor, and who fails to exercise that control with reasonable care, might provide a proper basis for liability under § 905(b), but concluded that the plaintiff had failed to introduce sufficient evidence of the shipowner's control over the stevedore's operation to support a recovery. 554 F. 2d at 1252.

Rich v. United States Lines, 596 F. 2d 541 (3d Cir. 1979), relied on by American at oral argument, continues the pattern of our earlier decisions. In *Rich* the plaintiff longshoreman was injured when he slipped on sheet ice which had accumulated on top of containers stacked on board the defendant's vessel. The panel first held that plaintiff's evidence was insufficient as a matter of law to support liability under § 414 of the Restatement. *Id.* at 550. The plaintiff, relying upon the legislative history of the Amendments, also argued that the shipowner had

[11]

breached its duty to provide a "safe place to work" by failing to take appropriate corrective action, despite its knowledge of the dangerous ice conditions. In a discussion closely tailored to the facts of the case, the panel majority rejected this contention on the ground that the plaintiff had failed to establish that the ice covered containers were a part of the ship for whose condition the shipowner was customarily responsible. In the panel's view, the evidence in the case showed "*beyond a doubt*" that the stevedoring company, rather than the vessel, was "*in complete charge* of the details of the handling of the containers." *Id.* at 557. (emphasis added). To impose liability on those facts, the court concluded, would "amount once again to the establishment of a non-delegable duty." *Id.* at 556 (citing *Hurst v. Triad Shipping, supra*, 554 F. 2d at 1251). The panel majority's view of the case made it unnecessary for them to consider the standard of care issue.

These decisions firmly establish that under § 905(b):

> The vessel has no general duty continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions).

Rich v. United States Lines, Inc., supra, 596 F. 2d at 560 (Garth, J., concurring) (footnote omitted). They do not, however, speak directly to the scope of the vessel's independent duty under § 905(b) to "exercise the same care as a land based person in providing a safe place to work." [7]

American presents two arguments against the standard of reasonable care under all the circumstances applied by the district court. First, it argues that a vessel should

7. H. R. Rep. No. 92-441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News 4698, 4704 [hereinafter cited as *House Report*].

[12]

not be held liable in negligence under § 905(b) if it has delivered the ship "in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter" will be able to load or unload the vessel safely by exercising "ordinary care under the circumstances." [8] Alternatively, American urges this court to adopt the standard of care established in Restatement (Second) §§ 343-343A to govern all actions under § 905(b).

We reject both suggestions. Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an "expert and experienced" fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds v. Compagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule barring all recovery against a negligent shipowner on the basis of imputed employer negligence. We do not hold that the likelihood of negligent conduct on the part of the stevedoring con-

8. American Brief at 14 (quoting *Hugev v. Dampskisaktieselskabet International,* 170 F. Supp. 601 (S. D. Cal. 1959), *aff'd sub nom., Metropolitan Stevedore Co. v. Dampskisaktieselskabet International,* 274 F. 2d 875 (9th Cir.), *cert. denied,* 363 U. S. 803 (1960).

tractor is always irrelevant in determining whether the vessel has breached its duty of due care. *Compare* Restatement (Second) of Torts § 302A [9] with *id.* § 302. But

[13]

the fact that the stevedore has been negligent cannot be automatically decisive of that question.

Similarly, we cannot agree that §§ 343 and 343A of the Second Restatement define for all cases the appropriate standard of care under § 905(b). It is true, as American points out, that we have approved reference to the Restatement (Second) in § 905(b) negligence actions "as the national expression of non-maritime tort principles." *Hurst v. Triad Shipping Co., supra,* 554 F. 2d at 1248; *Brown v. Ivarans Rederi A/S, supra,* 545 F. 2d at 863. But as *Hurst* itself illustrates, those provisions are adopted only when they are consistent with Congressional intent in enacting § 905(b). Sections 343 and 343A do not meet that standard. Both sections would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. *See* § 343A, Comment e. As we stated in *Hurst,* 554 F. 2d at 1250, *Brown,* 545 F. 2d at 863-64 n. 10, and *Rich,* 596 F. 2d at 551 n. 21, that principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk in cases decided under § 905(b).[10]

9. Section 302A reads:

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

10. *See House Report, supra* n. 7, [1972] U. S. Code Cong. & Admin. News.

More fundamentally, we think that it would be unwise to assume that the principles of negligence law applicable to owners of land will in all cases provide an appropriate "land based" standard of care for actions against a vessel owner. In some cases the analogy will be appropriate. In other cases, different portions of the Restatement, including, for example, the duty of care owed by a supplier of a chattel in commerce, may provide a more appropriate standard of reference. *Compare* Restatement (Second) of Torts §§ 388-389. Indeed, it might persuasively be argued that it was the latter duty which was breached in this case. Moreover, we agree with the district court that insofar as

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the standards of liability in § 343 and 343A are colored by traditional economic and social attitudes uniquely associated with land ownership, wholesale importation of those sections into § 905(b) might be confusing and counterproductive. *See Kermarec v. Compagnie Generale Transatlantique,* 358 U. S. 625 (1959); *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d 480, 486-88 (9th Cir. 1979); *Gallardo v. Westfal-Larsen & Co. A/S,* 435 F. Supp. 484, 493-95 (N. D. Cal. 1977); *Espinoza v. United States Lines, Inc.,* 444 F. Supp. 405, 409-12 (S. D. N. Y.), *aff'd,* 586 F. 2d 832 (2d Cir. 1978); G. Gilmore & C. Black, The Law of Admiralty 453-54 (2d ed. 1975).

The sounder approach, we think, is to recognize that § 905(b) imposes on vessel owners the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business. *Accord, Santos v. Scindia Steam Navigation Co., supra,* 598 F. 2d at 485-88; *Gallardo v. Westfal Larsen & Co. A/S, supra,* 435 F. Supp. at 496. *See Kermarec v. Compagnie Generale Transatlantique, supra,* 358 U. S. at 632; *Brown*

v. Ivarans Rederi A/S, supra, 545 F. 2d at 863. *Cf.* Restatement (Second) of Torts §§ 281-83, 302A, 305, 452. Proceeding from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.

At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen

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against that danger. *See Santos v. Scindia Steam Navigation Co., supra,* 598 F. 2d at 485.[11]

Reviewing the record in this case, we think that the district court's application of the standard of reasonable care under all the circumstances of this case touched all of these bases. Certainly, there was ample evidence to support the court's conclusion that American knew or should have known of the rusted, decrepit condition of the covers on barge 2730, and that American failed to exercise reasonable care to correct that condition. American does not argue otherwise. Rather the substance of American's argument is that the evidence was insufficient to show that it knew or should have known that the condition of the

11. *Compare* Restatement (Second) of Torts, §§ 343(a)-(c); *Id.* §§ 388(a) and (c).

barge posed an unreasonable risk of harm to longshoremen in Griffith's position. Specifically American contends that the difficulty with the stuck covers was obvious and could have been solved without danger to anyone, and that therefore American should not have been required to anticipate that Wheeling would attempt to overcome the defect in the covers by the unsafe method to which it resorted.

In pressing this argument American attacks both the factual and legal findings of the court below. American points factual and legal findings of the court below. American points to the district court's reference to missing eyelets to which the hook which Griffith was holding could have been attached, and argues that that finding is clearly erroneous. In fact, the record shows that there were two eyelets on the covers, one close to each side of the barge (Exhibit D2). But the uncontradicted trial testimony was that Wheeling's employees had tried ten or twenty times without success to unstick the barge covers by attaching cables to those eyelets. (224a-225a; 313a-314a). The missing eyelets to which the court referred would have been at the center of the covers, where they could have been grasped in a balanced manner by the crane cables. Because such eyelets were missing or had never been installed,

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Wheeling's employees had to remain on the cover, holding the cable hooks under the rim of the cover, while tension was applied.

American also argues that there were alternative methods available to Wheeling-Pittsburgh by which the covers might have been moved safely, which it was entitled to assume that Wheeling would rely upon. One safe alternative method which American suggests is the use of the

outboard eyelets on the covers, a method which the testimony discloses was tried and which, due to the defective condition of the barge, proved ineffective. William Toutant, the designer of barge No. 2730, also testified that with the use of a four part sling the covers, which weigh over nine thousand pounds, could have been lifted off safely. (393-a). But Frank Merritt, an American employee, was aware, before barge No. 2730 was furnished to Wheeling, that at Allenport Wheeling regularly used the double cable method of moving stuck barge covers. (41a). Thus when American furnished barge No. 2730 it knew or should have known that the combination of the unlubricated, rusty and bent track mechanism and the missing center eyelets would expose Wheeling's longshoremen to the precise sort of risk to which Griffith was exposed. The fact that Wheeling's chosen method of operation may have been negligent is therefore of no help to American.[12]

The record before the district judge contained substantial evidence that American knew of the condition on board its vessel; that it knew or should have known that that condition posed an unreasonable risk to workers in Griffith's position; and that it failed to correct that condition. On this record, then, we hold that the district court's findings of fact with respect to American's liability to Griffith are not clearly erroneous, and that its application of a general standard of reasonable care in the circumstances was not legal error.

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IV. Wheeling's Appeal Against Griffith

Wheeling does not contest that, if it was properly held to be an owner *pro hac vice*, it was guilty of negligence in

12. *See* Restatement (Second) of Torts § 302 *quoted supra* at n. 9.

that capacity. But it contends that the judgment against it in favor of Griffith must be reversed because as a matter of law it is not an owner *pro hac vice*. An appreciation of that argument requires an examination of the complex procedural history of this case. As we indicated above, the trial court in 1974 granted Wheeling's motion for summary judgment against Griffith. In doing so it accepted Wheeling's argument that even assuming its alleged status as an owner *pro hac vice*, the LHWCA precluded liability against it in favor of an employee. 384 F. Supp. at 237. Since that legal theory rendered its ownership status immaterial, Wheeling argues, it did not file affidavits contesting that status in support of its motion for summary judgment. On appeal this court, accepting as undisputed Wheeling's exclusive though temporary control of barge No. 2730, rejected its legal position that the LHWCA barred recovery against it as an owner *pro hac vice*. As we explained: "Wheeling concedes that it might be found to be an 'owner pro hac vice' as that term has been applied in this circuit." 521 F. 2d at 39-40 (footnote omitted). Thus, our reversal of summary judgment in Wheeling's favor established no more than that based on the pleadings, affidavits, and discovery materials then on file, a factfinder could find Wheeling to be a *pro hac vice* owner within the meaning of *Blair v. United States Steel Corp.*, 444 F. 2d 1390 (3d Cir. 1971) (per curiam), *cert. denied*, 404 U. S. 1018 (1972).

Wheeling now points out that there is substantial additional evidence in the record concerning its relationship to barge No. 2730 which was not of record at the time of the summary judgment. That evidence, it contends, establishes that it was not a *pro hac vice* owner as defined in *Blair*. It contends, moreover, that the trial court, in misplaced reliance on the law of the case doctrine, disregarded

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that additional evidence in holding it liable. Finally, it contends that even if the *Blair* standard as to *pro hac vice* ownership has been met, that case should be overruled.

When the case was first before us it was undisputed, and still is after trial, that barge No. 2730 was delivered to Wheeling's Allenport landing by a river boat company, and incorporated into a fleet there under the supervision of Joseph Allfree, Wheeling's river dock foreman. From the time Wheeling received the barge until the time of the accident it had exclusive possession. All movements of the barge while it was in Wheeling's possession were the responsibility of Wheeling's employee rivermen. Their duties included placing lights on the barges moored with Wheeling's fleet and moving them about the landing to facilitate loading. Barge No. 2730 was one of a number furnished to Wheeling for transportation of its products, and it was free to chose which among them it would use. These undisputed facts fit squarely with the *Blair* holding. Wheeling does not contend that any available evidence bearing on its relationship to barge No. 2730 was excluded at trial. Rather, it points to additional evidence introduced at trial, as follows:

> [Wheeling] could load only material destined for a pre-determined port (350a); the charter between [Wheeling] and American was oral rather than written (7a, 337a, 566a); Barge 2730 could have been removed by American for repairs without [Wheeling's] prior permission (355a-356a); [Wheeling] was not responsible for rent on American barges which were unavailable due to repair (358a); [Wheeling] paid American for Barge 2730 according to tonnage shipped rather than type of barge used (449a, 564a); [Wheel-

> ing] had nothing to do with the route or time which Barge 2730 took to arrive at its final destination (565a, 349a); and [Wheeling] could not move Barge 2730 from its landing without [American's] consent and without the assessment of an additional fee. (354a, 358a) (ICC Waterways Freight Tariff, 8-B, Items 420-435)

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Wheeling's Brief in No. 76-2160 at 12. Wheeling argues that because the trial court relied on the law of the case doctrine it disregarded this trial evidence. Because the record is not clear on this issue, we must remanded for further factual findings.

The trial court found after trial that:

> The status of [Wheeling] as owner *pro hac vice* at the time of the injury is well established under *both* the law of the case *and* the applicable case law.

452 F. Supp. at 845 (emphasis supplied). Since evidence on the issue of Wheeling's relationship in barge No. 2730 was received, and the court nowhere denied considering it, the quoted language could be understood as a finding upon all the evidence presented, that Wheeling fell within the definition of *pro hac vice* owner announced in *Blair* and in *Griffith I*. On the other hand, it may be read as relying solely on the holding in *Griffith I* to determine the issue of ownership status. There are a number of indications in the record that the district judge may well have erroneously viewed our decision in *Griffith I* as foreclosing any factual inquiry into Wheeling's ownership status on remand. *See* 340a; 341a; 342a. Because we are unable to determine from the record whether the district judge actually consid-

ered the further evidence bearing on ownership status submitted by Wheeling, and because Wheeling was entitled to have the district judge pass on that evidence before he determined its ownership status, a remand is required for further findings of fact on that issue.

We reject, however, Wheeling's further contention that *Blair* and *Griffith I* should be overruled. In the first place that would require action by the court in banc. Nor is this panel persuaded that the *Blair* holding should be reconsidered.[13] Wheeling argues that that holding imposes an

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inconvenience upon barge users who operate their own landings and perform their own stevedoring. That may be, but such barge customers also undoubtedly obtain substantial cost and convenience advantages from doing so. If the barges remained in the possession and control of an owner's crew, that crew would supervise use of the barge at the landing and might possibly guard against injuries to longshoreman invitees. But the bargeline customer would be charged accordingly. When that customer chooses to take exclusive possession and control of a barge in navigation, even for a limited time and in a limited space, it should, as we have held, be obliged to discharge the responsibilities of an owner. Another experienced admiralty court agrees. *See Eskine v. United Barge Co.*, 484 F. 2d 1194 (5th Cir. 1973).

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13. Judge Weis believes that *Blair* should not be extended but should be limited to its facts, and that the burden of establishing a demise charter rests upon the owner of the vessel. *See Guzman v. Pirchirilo*, 369 U. S. 698 (1962); *Leary v. United States*, 81 U. S. 607, 612 (1871); *Dobbins v. Crane*, 567 F. 2d 559 (3d Cir. 1977); *Fitzgerald v. A. L. Burbank*, 451 F. 2d 670, 676 (2d Cir. 1971); *Miller v. Union Barge Line Corp.*, 299 F. Supp. 718 (W. D. Pa. 1969).

Wheeling also contends that the trial court erred in finding that it was negligent, in its capacity as owner *pro hac vice*, in falling adequately to train steelworkers unfamiliar with river work. That contention bears upon the allocation of liability between Wheeling and American. It does not, however, affect Wheeling's liability to Griffith, since findings that Wheeling was negligent as owner *pro hac vice* in providing a defective barge, and in failing to inspect, repair or reject it, are not challenged as factually or legally erroneous.

Thus we hold that the judgment of liability in favor of Griffith against Wheeling as owner *pro hac vice* must be vacated and remanded for further findings regarding Wheeling's status as owner.

V. Wheeling's Appeal Against American

A. *Indemnification*

Wheeling also appeals from the district court's rejection of its claim against American for indemnification. While a factual finding in the district court that Wheeling was not an owner *pro hac vice* would moot this claim, we think that in light of the possibility that the issue of con-

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tribution or indemnity is not foreclosed by our remand, resolution of this question is proper on this record.

Wheeling contends that when a demise charterer—an owner *pro hac vice*—and an owner are both found to be negligent with respect to any injury-causing defeat, the negligence of the owner in supplying the defective barge is active or primary, while that of the owner *pro hac vice*, in failing to discover and remedy the defect is passive or secondary. A tortfeasor who is only secondarily or pas-

sively negligent, it urges, is entitled to indemnification for any loss occasioned by the primary or active negligence of another. It points out that such a non-contractual duty by a primary or active tortfeasor to indemnify a secondary or passive tortfeasor has been recognized both by Pennsylvania law, *e.g.*, *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A. 2d 368 (1951); *Tromza v. Tecumseh Products Co.*, 378 F. 2d 601 (3d Cir. 1967), and in maritime cases. *E.g.*, *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F. 2d 178 (5th Cir. 1969); *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (2d Cir. 1929).

We reject at the outset Wheeling's suggestion that rights of indemnity and contribution between maritime joint tortfeasors should be governed by state law. Consistent with the intent of Congress in enacting the 1972 Amendments, we think that whatever rule is adopted should be uniform and federal. *Brown v. Ivarans Rederi A/S*, *supra*, 545 F. 2d at 861-63; *Griffith I*, *supra*, 521 F. 2d at 44 & n. 21. Moreover, while we recognize that the federal cases cited by Wheeling might once have had some force, we think that the law of maritime indemnity has been substantially altered by the Supreme Court's decision in *United States v. Reliable Transfer Co.*, 421 U. S. 397 (1975). In that case the Court abandoned the traditional rule of "divided damages" for maritime collision cases. That rule required "the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their

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fault may have been." 421 U. S. at 397. In the future, the Court held, collision damages should be apportioned on a comparative fault basis. The rationale behind that de-

cision was simple: allocation of liability directly in proportion to fault was a much fairer method of determining damages than the rough and ready 50-50 division imposed by the traditional rule.

The rule of non-contractual indemnity pressed by Wheeling, like the contribution rule at issue in *Reliable Transfer*, is designed to shift the primary burden of reparations to the party more at fault, thereby avoiding unjust, or at least unsatisfactory results. But the rule performs that task by relieving a concededly negligent tortfeasor—albeit his negligence was "passive"—from *any* liability for the damage that occurred. That result seems strongly at odds with the preference for comparative fault expressed in *Reliable Transfer*. A similar rule, formerly applied in maritime collision cases, held that when one ship's negligence was "major," and the other's "minor," the grossly negligent party could be held solely at fault. *E.g.*, *The City of New York*, 147 U. S. 72, 85 (1893). The *Reliable Transfer* Court dismissed this rule as "inherently unreliable" and unfair. "That a vessel is primarily negligent does not justify it shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." 421 U. S. at 406. Similarly, we can see no good reason why in this non-collision maritime context the fact that Wheeling's conceded negligence as owner *pro hac vice* may have been less egregious than that of American should justify the creation of a right of indemnity which would impose sole responsibility for the accident on American, while allowing Wheeling to go scot-free. In *Griffith I, supra*, we suggested that the preferable approach would be to apply the comparative fault principles endorsed in *Reliable Transfer* to achieve an equitable appointment of liability between the two alleged joint tortfeasors. The district court applied those principles here, and we affirm that application.

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Thus we hold that the district court properly rejected Wheeling's claim that it should be fully indemnified by American for its liability to Griffith.

B. *Percentage of Negligence*

The trial court, as we noted above, entered judgment against Wheeling for $52,324.87 and against American for $104,649.73, because it held that Wheeling as owner *pro hac vice* was responsible for 25%, and American for 50% of the total damages of $209,299.45. In Part I we held that it was improper to diminish Griffith's recovery by a percentage equal to Wheeling's stevedore negligence. If the court determines on remand that Wheeling is an owner *pro hac vice*, the defendants are jointly and severally liable under § 905(b) for the full amount of Griffith's damages. That holding would require a redetermination of the amount for which each defendant is liable. According to the district court, negligence actionable under § 905(b) produced 75% of the damages, of which 50% was attributable to American and 25% to Wheeling. The court's findings suggest that on remand contribution in the ratio of two thirds-one third would be appropriate. Thus, if the findings upon which the 50%-25% allocation was based were sustainable it would be a simple matter to calculate the contribution of each defendant toward the $209,299.45 joint liability.

Unfortunately, however, we are not in a position to make that simple calculation. As we noted above, the trial court predicated its finding of negligence by Wheeling as owner *pro hac vice* in part on Wheeling's "[f]ailure to give adequate safety instructions to steelworkers unfamiliar with river work." 452 F. 2d at 845. Wheeling notes that there is a serious problem of proximate cause with

respect to that finding, since in the same accident which injured the untrained Griffith, his supervisor, Joseph Armstrong, a well-trained and experienced riverman, was also injured. More fundamentally, Wheeling observes, and we

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agree, that on this record, its failure to train Griffith and his fellow servants was, insofar as it contributed to his injuries, a failure to train them in longshoreman skills. That failure must as a matter of law be attributed to Wheeling in its capacity as a stevedore rather than as an owner *pro hac vice*. "The only negligence of [Wheeling] which could properly be . . . attributed to Wheeling [as owner *pro hac vice*] was its negligence in failing to inspect, reject, or correct [b]arge 2730." Appellant's Brief in No. 78-2160 at 25. Since the trial court did not disclose to what extent its finding of 25% culpability was attributable to Wheeling's failure to train, we cannot recalculate the allocation between Wheeling and American for purposes of contribution. A remand is necessary so that the trial court can make that determination, excluding from the calculation Wheeling's negligence in failing to train.

VI. American's Appeal Against Wheeling

American objects to the allocation of liability between it as owner and Wheeling as owner *pro hac vice* on the basis of 50%-25%. It urges that since the duties of an owner and an owner *pro hac vice* are the same, their liabilities should be the same unless some special circumstance alters the balance. We readily grant that the duties to third parties of an owner and an owner *pro hac vice* are the same, with respect to the condition of the vessel. Both are required to exercise reasonable care under all the circumstances of the case. But it does not follow that because

their duties are the same and each breached those duties in some manner their liability *inter sese* for a joint tort should be the same. What we have said in Part V-A, above about the applicability of the principles of *Reliable Transfer* is equally applicable here. When two acts of negligence concur in causing injury, contribution should be allocated on a comparative fault basis. The trial court heard the testimony and made a factual determination as to comparative fault which, except to the extent discussed in Parts IV and V-B, above, we cannot find clearly errone-

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ous. Our decision in Part V-B, above requires a redetermination of the percentage of contribution, excluding one of the factors on which the trial court relied.

Conclusion

The judgment appealed from will be modified so as to provide that American as owner is jointly liable to Griffith for $209,299.45. The judgment will be vacated, insofar as it determines that Wheeling was liable as an owner *pro hac vice*, and the case remanded for a redetermination, on all the evidence presented, of Wheeling's ownership status. If Wheeling is held to be an owner *pro hac vice*, then the court should redetermine the liability of each defendant consistent with Part V-B. of this opinion. Costs shall be taxed in favor of Griffith against American, but Wheeling and American shall between themselves each bear their own costs.